IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Civil Revision No.143 of 1993

Date of Decision: 26.09.2007

Sarup Singh ..Petitioner

Vs.

Dalbara Singh & Ors. ..Respondents

Coram: Hon'ble Mr. Justice Vinod K.Sharma.

Present: Mr.Sumeet Mahajan, Senior Advocate,
with Mr.S.L.Bhalla, Advocate,
for the petitioner.

Mr.Rajan Gupta, Advocate,
for respondents No.1 to 3.

Vinod K.Sharma,J.

Present revision petition has been filed against the order passed by learned Additional District Judge, Ludhiana allowing an application filed by the legal representatives of Dalbara Singh defendant to amend the written statement.

The plaintiff-petitioner filed a civil suit for specific performance of contract of sale dated 16.6.1986 qua the suit land measuring 32 kanals 18 marlas being 1/3rd share of the land measuring 98 kanals 14 marlas situate in the revenue estate of Naraingarh, tehsil Khanna for a consideration of Rs.1,02,812.50P and seeking direction to defendant No.1 to execute the sale deed of this land on receipt of Rs.42,812.50P after adjusting Rs.60,000/- received by him as earnest money.

In the suit declaration was also sought to the effect that the sale deed dated 13.1.1987 executed by defendant No.1 of half share of land measuring 9 kanals 6 marlas out of the land measuring 33 kanals 12 marlas in favour of defendants No.4 and 5 to be illegal inoperative, ineffective against his rights and not binding upon him. In the alternative a decree for for the recovery of Rs.1,02,812.50P including refund of Rs.60,000/- as earnest money and Rs.42,812/- towards damages were claimed.

In the suit defendant No.1 was impleaded as a vendor, whereas defendants No.2 and 3 were impleaded as co-sharers of the part of the suit land whereas defendants No.4 and 5 were impleaded as subsequent vendees. Defendant No.3 did not appear to contest the suit despite service. He was proceeded ex parte. However, defendant No.2 did not choose to file written statement and the suit was contested by defendants No.1, 4 and 5. Defendant No.1 challenged the maintainability of the suit. It was claimed that the suit was bad for misjoinder and non-joinder of parties. Locus standi of the plaintiff to file the suit was also challenged. It was claimed that the

suit was not in terms of proforma Nos.47 and 48 of the Code of Civil Procedure. Valuation of the suit was also challenged. Defendant No.1 also denied his having entered into the agreement of sale dated 16.6.1986. He also denied the receipt of earnest money of Rs.60,000/-. Delivery of possession was also disputed.

The stand of defendant No.1 was that Som Nath, the attesting witness of the alleged agreement of sale was Commission Agent of Khanna to whom defendant No.1 used to sell his agriculture produce. Som Nath owed some money to him on account of sale of agriculture produce but he refused to render the account to defendant No.1 or to pay him money which was due to him. It was claimed that this agreement of sale has been fabricated by Som Nath aforesaid in collusion with the plaintiff. It was also claimed that the suit land was joint Hindu family and co-parcenary property which was yet to be partitioned so defendant No.1 was not yet owner of the said land. However, it was claimed that part of the suit land sold in favour of defendants No.4 and 5 on 13.1.1987 was perfectly legal and valid.

Suit was also contested by defendants No.4 and 5 who claimed to be bona fide purchasers for consideration without notice. It was also claimed that they were in actual cultivating possession. It was claimed that no suit for permanent injunction against them was competent.

The suit was decreed by the learned trial court by granting the following relief:-

" In view of my findings on the issues discussed above, the

suit of the plaintiff is decreed for specific performance of agreement dated 16.6.86 with regard to the land measuring 28 kanal 5 marlas out of 1/3rd share of defendant No.1, out of the total measuring 98 kanals 14 marlas, as per description in clause (a) (sic. A) of the head note of the plaint. The plaintiff shall deposit the balance sale consideration within two months failing which it shall have an affect (sic) of dismissing the suit. Defendant No.1 shall execute the sale deed in favour of the plaintiff, failing which the plaintiff shall be entitled to get the same executed by way of execution. Defendant no.1 is also burdened with costs of the suit. Relief of declaration regarding the sale deed dated 13.1.1987 in respect of the land as detailed in clause (b) of the head note of the plaint, executed by the defendant no.1 is however, declined. Decree sheet be prepared accordingly."

Against the judgment and decree passed by the learned trial court defendant No.1 Dalbara Singh preferred an appeal. However, during the pendency of the said appeal he passed away and his legal representatives were brought on record. On being impleaded as party an application was moved by the legal representatives of Dalbara Singh to amend the written statement. By way of amendment they sought to raise the following additional preliminary objections:-

"Preliminary objection No.11: That the plaintiff is not entitled

either to the discretionary relief of specific performance nor to the relief of declaration as sought in the plaint. The plaintiff Saroop Singh is joint in residence and mess with his sons namely Sher Singh, Mohinder Singh and Jagtar Singh residents of village Naraingarh, Tehsil Khanna, District Ludhiana. The sons of the plaintiff had purchased land measuring 20 kanals 14 marlas from Gurdial Singh and Charan Singh respondents No.4 and 5 comprised in Khata No.81/112 20/34 rectangle No.3 Killa No.12, 11/2, 13/2, 8/2 20 vide sale deed dated 16.5.90. In this land purchased by the sons of the plaintiff Dalbara Singh was having one half share i.e. 10 kanals 7 marlas which is out of the land for which the plaintiff has filed the suit. Similarly out of the land under the alleged agreement the respondents no.4 and 5 Gurdial Singh and Charan Singh had sold 20 kanals 15 marlas to Gurmel Singh, Paramjit Singh, Sukhminder Singh and Malkiat Singh sons of Ujagar Singh residents of village Naraingarh tehsil Khanna, Distt. Ludhiana vide sale deed 16.5.90. In this land also the appellant Dalbara Singh had one half share i.e. 10 kanals 7-1/2 marlas. This land was part of the alleged land for which the plaintiff has sought the relief of specific performance or the declaration for the cancellation of the sale deed of mere 9 kanal 6 marlas. The plaintiff had not sought the cancellation of the sale deeds of

one half of 41 kanal 6 marlas of land which was executed by Dalbara Singh in favour of Gurdial Singh and Charan Singh vide sale deed dated 11.7.86. Further the plaintiff has not sought cancellation of sale deed dated 16.5.90. Both these sale deeds were executed on the same day by the same scribe and these were attested by the same witnesses namely Netar Singh and Mohan Singh. The plaintiff has not sought the cancellation of these sale deeds either of 1.7.86 or of 16.5.90 rather he has admitted and condoned those acts.

The plaintiff who had sought the specific performance of the agreement had already purchased and got purchased 20 kanals 14-1/2 marlas out of the total land of Dalbara Singh measuring 32 kanals 18 marlas. When the plaintiff has accepted the sale, so in no circumstances he is entitled to the specific performance of the agreement/contract. Thus no suit for specific performance is maintainable.

Preliminary objection No.12: That the plaintiff is also not entitled to the discretionary relief of declaration.

Preliminary objection No.13: The plaintiff is estopped by his act and conduct from enforcing either of the reliefs."

The application was opposed by the plaintiff-respondent.

Learned Additional District Judge, Ludhiana distinguished the authorities relied upon by the petitioner and observed that the proposed

amendment was not being allowed as a matter of right or as a matter of course. The same was being allowed for determining the real question in controversy and on satisfying himself as to why the said plea was not taken before the trial court. The learned Additional District Judge further observed that though in the application moved under Order 6 Rule 17 of the Code no reasons have been stated as to why this plea which was being taken by way of amendment was not taken but the reasons can be gathered from the findings recorded by the learned trial court in para No.17 of the judgment wherein it has been observed as under:-

> "As regards the sale deeds dated 16.5.1990 copy of the same being Ex.DW-7/A and Ex.DW-7/B having been executed by the defendants Gurdev Singh and Charan Singh in favour of their vendees namely Sher Singh, Mohinder Singh and Jagtar Singh sons of Sarup Singh qua Ex.DW-7/A and Gurmel Singh, Paramjit Singh, Sukhminder Singh, Balwinder Singh, Amrik Singh, Lakhbir Singh for 219/415 share and Malkiat for 196/215 share qua Ex.DW-7/B any part of the land including in the two sale deeds and which forms a part of the suit land will not affect the right of the plaintiffs in the suit land because the defendants Gurdev Singh and Charan Singh transferred the land vide two sale deeds during the pendency of the suit and, therefore, alienation touching any part of the suit land is hit by the principle of lis pendens. However, I decide this issue in

favour of the defendants No.4 and 5 and against the plaintiff."

Learned lower court, therefore, came to the conclusion that the impugned part of the judgment shows that by way of sale deed dated 16.5.1990 Gurdial Singh and Charan Singh defendants had sold some part of the land to subsequent vendees. However, no such plea based on such sale deed was raised. The learned Additional District Judge, therefore, formed an opinion that it was on account of cross negligence on the part of the learned counsel who represented the contesting defendants. Learned court observed that as the sale deeds were proved on record it cannot be held that the plaintiff would be taken by surprise.

The plea of the plaintiff-petitioner that it was not open to defendant No.1 to take this plea as it was for the defendants No.4 and 5 to have taken such plea was rejected by observing that the plea, now sought to be taken is to non-suit the plaintiff and to contend that the suit was not maintainable and therefore, it was observed that the amendment sought was necessary for determining the real question in controversy. The plea of the plaintiff-respondent that the sale deeds referred to above were hit by principle of lis pendens, the learned Additional District Judge was pleased to observe that sons of the plaintiffs were joint with him and they have purchased a part of the suit land, therefore, it remains to be determined if the same was really the case. On the basis of the observations made above, learned Additional District Judge was pleased to come to the conclusion that the proposed amendment was necessary for determining the real

matter in controversy and allowed the amendment.

Mr. Sumeet Mahajan, learned senior counsel appearing on behalf of the petitioner contended that the impugned order cannot be sustained in view of the provisions of Order 22 Rule 2 and Order 1 Rule 10 of the code. It was contended that legal representatives take the place of and are bound by the pleadings of their predecessor and they cannot pursue their own individual rights and interest particularly when they fail to establish themselves of having any other status in relation to the case. In support of this contention, learned senior counsel for the petitioner placed reliance on the judgment of Hon'ble Supreme Court in **Gajraj Vs. Sudha and others (1999) 3 Supreme Court Cases 109**.

Learned senior counsel for the petitioner also contended that the learned Additional District Judge erred in law in allowing the amendment of the written statement at appellate stage, as the same is likely to result in do novo trial which is not permissible in law. In support of this contention, learned counsel for the petitioner placed reliance on the judgment of this court in the case of **Smt.Urmila Devi Vs. Nar Singh and others 2005 (1) R.C.R. (Civil) 813.** Paras No.4 and 5 of the said judgment read as under:-

> "4. Having heard the learned counsel at a considerable length, I am not able to persuade myself to accept the submissions made by the learned counsel because the suit was filed in the year 1987 and after more than 14 years the judgment

and decree was passed by the learned Civil Judge on 16.8.2001. Thereafter, the appeal was preferred being C.A. No.45 on 26.9.2001. During this period, no objection with regard to requirement of impleadment of necessary party was taken nor any application was filed. However, for the first time an application was filed on 27.1.2004 when the case was posted for arguments before the learned Additional District Judge. Such a conduct does not augur well the judicial system especially when the rights of the plaintiff-respondents have crystalised. I am in agreement with the observations made by the learned Additional District Judge that the prayer made by the defendant-petitioner lacks bona fide and is a device to delay the decision of the appeal. Therefore,the instant petition s liable to be dismissed.

5. Even otherwise I am of the view that if the defendant-petitioner is permitted to implead 'Thakurdwara' as a party respondent, it would necessarily result into a de novo trial. It is a settled proposition of law that if the resultant effect of impleadment of a party is a de novo trial, then such a party should not be permitted to be impleaded. For the aforementioned view reliance can be placed on a judgment of the Supreme Court in the case of **Anokhe Lal Vs. Radhamohan Bansal, AIR 1991 SC 257.** Moreover, if no

objection has been raised in the written statement nor any argument was addressed when the judgment and decree by trial Court has been passed, then the objection is deem d to be waived. For the aforementioned view reliance could be placed on a judgment of the Supreme Court in the case of **Behari Lal Vs. Bhuri Devi, 1997 (2) SCC 279."**

Mr. Rajan Gupta, learned counsel appearing for the respondents No.1 to 3 supported the order passed by the learned lower appellate court primarily on the ground that the amendment of the written statement is to be liberally construed and the same can also be raised at appellate stage if new plea is available. In support of this contention he has placed reliance on the judgment of Hon'ble Supreme Court in the case of **Ishwardas Vs. The State of Madhya Pradesh and others AIR 1979 SC 551**, wherein it has been held as under:-

"4. There is no impediment or bar against an appellate Court permitting amendment of pleadings so as to enable a party to raise a new plea. All that is necessary is that the Appellate Court should observe the well known principles subject to which amendments of pleadings are usually granted. Naturally, one of the circumstances which will be taken into consideration before an amendment is granted is the delay in making the application seeking such amendment and if made at the appellate stage, the reason why it was not sought in the trial

> Court. If the necessary material on which the plea arising from the amendment may be decided is already there, the amendment may be more readily granted than otherwise. But, there is no prohibition against an Appellate Court permitting an amendment at the appellate stage merely because the necessary material is not already before the Court."

Learned counsel for the respondents also placed reliance on the judgments of Hon'ble Supreme Court in **Harcharan Vs. State of Haryana AIR 1983 SC 43; Ragu Thilak D.Joh Vs. S.Rayappan and others (2001) 2 SCC 472** and **Estralla Rubber Vs. Dass Estate (P) Ltd. (2001) 8 SCC 97** to contend that the amendment of pleadings cannot be denied merely on the ground of delay. The contention of the learned counsel was that even if the amendment sought is barred by limitation the same should still be allowed and the disputed matter made subject-matter of an issue.

Learned counsel for the respondents also contended that exercise of discretion of the learned court below cannot be lightly interfered with in exercise of jurisdiction under Article 227 of the Constitution as nothing has been shown as to how the amendment is likely to cause manifest injustice and in support of this contention he placed reliance on the judgment of Hon'ble Supreme Court in the cases of **Ouseph Mathus Vs. M.Abdul Khadir, 2002 (1) SCC 319** and **Virendra Kashinath Ravat and another Vs. Vinayak N.Noshi and others, 1999 (1) RCR (Civil) 24**

(SC): 1999 (1) SCC 47.

The applicants were admittedly brought on record as the legal representatives of Dalbara Singh who died during the pendency of the appeal, therefore, it was not open to them to take a plea different from the one taken by Dalbara Singh who had, in fact, denied the execution of the sale deed.

It is also not understood as to how the amendment sought was relevant for the purpose of adjudicating the question raised in the suit which was filed for specific performance of agreement to sell. It is the settled law that every sale made during the pendency of the suit is hit by principle of lis pendens. In any case, it was not open to the legal representatives of Dalbara Singh to raise this plea of sale and it was for the subsequent vendees to raise whatever plea was available to them.

In this view of the matter it cannot be said that the amendment sought was necessary for the just and and proper adjudication of the case. Rather the amendment sought was not relevant for deciding the controversy between the plaintiff and defendant No.1 and the application moved was merely an attempt to delay the proceedings. The contention raised by the learned counsel for the respondents cannot be accepted as the jurisdiction of the appellate court to allow amendment at appellate stage is limited to the matters which are necessary for the just and proper adjudication of the case and on fulfilling the conditions contained under Order 6 Rule 17 of the Code. The appellate court does not have an unrestricted power to allow

any amendment whether relevant or not relevant to the matter in issue, and therefore, no benefit can be taken by the respondents from the judgment of Hon'ble Supreme Court in the case of **Ishwardas Vs. The State of Madhya Pradesh and others (supra).** Other judgments relied upon by the learned counsel for the respondents are also not relevant to the present case as the application for the amendment was not being dismissed on account of delay but for the reason that it was not open to the legal representatives of Dalbara Singh to take plea different from the one taken by the deceased party whom they represent. Furthermore, as already observed the amendment sought cannot be said to be necessary for determining the real controversy i.e. specific performance of the contract entered into between the parties.

In view of what has been stated above, the order passed by the learned Additional District Judge, Ludhiana cannot be sustained. Consequently, this revision is allowed. The impugned order is set aside and the application filed by the respondent legal representatives of deceased Dalbara Singh is ordered to be dismissed.

(Vinod K.Sharma)
Judge

26.09.2006
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